

**IT : Assessee is free to provide depreciation at a rate higher than what is mentioned in Schedule XIV of Companies Act, 1956. However, in opting for this method, assessee has to show that depreciation is calculated in accordance with clause (b) of section 205(2) of Companies Act, 1956 – Be that as it may, unless an assessee can show that depreciation was provided by spreading 95 per cent of original cost, on specified period, a claim in excess of what is set out in Schedule XIV of Companies Act, 1956 cannot be allowed**

• Where assessee had charged depreciation for wind mills at 80 per cent as windmill had not performed at expected level, but while computing book profit under section 115JB, Assessing Officer had restricted depreciation 5.28 per cent, since nothing was brought on record to show how and on what basis, specified period and higher rate of depreciation was arrived at by assessee, lower authorities were justified in falling to Schedule XIV of Companies Act, 1956 and holding that assessee had no reason to provide depreciation at a rate, higher than what was specified in said schedule

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**[2018] 93 taxmann.com 215 (Chennai - Trib.)**

**IN THE ITAT CHENNAI BENCH 'A'**

**Indus Finance Corporation Ltd.**

**v.**

**Deputy Commissioner of Income-tax**

**N.R.S. GANESAN, JUDICIAL MEMBER  
AND ABRAHAM P. GEORGE, ACCOUNTANT MEMBER  
IT APPEAL NO. 1348 (CHENNAI) OF 2017  
[ASSESSMENT YEAR 2012-13]  
MAY 3, 2018**

**S. Sridhar**, Adv. *for the Appellant.* **A.R.V. Sreenivasan** *for the Respondent.*

## **ORDER**

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**Abraham P. George, Accountant Member** - Assessee in this appeal filed against an order dated 26.04.2017 of the Id. Commissioner of Income Tax (Appeals)-6, Chennai, has taken altogether eleven grounds of which ground No.1 & 11 are general needing no specific adjudication.

**2.** Ld. Counsel for the assessee at the outset submitted that he was not pressing grounds 2, 3 and 10. Accordingly, grounds 2, 3 and 10 are dismissed as not pressed.

**3.** Vide its ground No.4, grievance raised by the assessee is on a disallowance of interest cost of Rs. 70,75,350/-.

**4.** Assessee engaged in a business of non banking financial services was required by Id. Assessing Officer during the course assessment proceedings to furnish details of statutory liabilities and the proof of payment. Assessee had booked an interest of Rs. 70,35,356/- as payable on loans, taken on the security of three keyman insurance policies. Such interest was added to the outstanding loan amount due to LIC. However, assessee it seems could not produce any evidence for remitting such interest. Ld. Assessing Officer, disallowed the claim relying on Section 43B of the Income Tax Act, 1961 ( in short

"the Act"). Assessee's appeal before Id. Commissioner of Income Tax (Appeals) was not successful. Nevertheless, Id. Commissioner of Income Tax (Appeals) specifically mentioned that assessee was at liberty to make a claim u/s.43B of the Act in the year when the interest were actually paid.

5. Now before us, the Id. AR strongly assailing the orders of the lower authorities submitted that interest on loans taken on the basis of keyman insurance policies would not fall u/s.43B of the Act.

6. Per contra, Id. Departmental Representative strongly supported the order of the Id. Commissioner of Income Tax (Appeals).

7. We have considered the rival contentions and perused the orders of the authorities below. Section 43B(d) of the Act which is apposite is reproduced hereunder:-

*"Section 43B Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of--*

(a) to (c) \*\*

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*(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State Financial Corporation or a State Industrial Investment Corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing, or*

*shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him".*

There is no dispute that interest to the extent of Rs. 70,35,356/- on loans borrowed from LIC, a public financial institution, stood payable as at the end of relevant previous year. Section 43B of the Act, mandates that interest payments could be allowed only in the year in which it is actually paid. Assessee having not paid interest during the relevant previous year, lower authorities were justified in applying Section 43B of the Act and making a disallowance. Accordingly, ground number 4 is dismissed.

8. Vide its ground 5 to 9, assessee is aggrieved on recomputation of book profit, as done by the Id. Assessing Officer u/s.115JB of the Act, by restricting the claim of depreciation on windmills to 5.28% as against 80% reckoned by the assessee.

9. Id. Counsel for the assessee submitted that assessee had charged depreciation for wind mills at 80%. As per the Id. Authorized Representative, though the rate prescribed under Schedule XIV of the Companies Act, 1956 was only 5.28%, assessee was well within its right to charge depreciation at a higher rate. As per the Id. Authorized Representative, the wind mills had not performed to the level expected and therefore assessee was constrained to charge depreciation, above the rate prescribed under Companies Act. Contention of the Id. Authorised Representative was that Id. Assessing Officer as well as Id. Commissioner of Income Tax (Appeals) did not appreciate the argument of the assessee that rate of depreciation given in Schedule XIV of the Companies Act, was only the minimum that had to be charged and assessee was at liberty to claim excess depreciation, when the situation warranted. As per the Id. Authorised Representative, the claim was not accepted despite the assessee bringing to the notice a Circular No.2/89, dated 07.03.1989 issued by Ministry of Industry, Department of Company Affairs. Id. Authorised Representative also relied on notes forming part of financial statements, which accordingly to him gave clear reason why higher depreciation was being charged on windmills. Reliance was also placed on the decision of a Co-ordinate Bench of the Tribunal in the case of *DCIT v. Indowind Energy Ltd, (ITA No.1854/2015, dated 25.10.2016)*.

10. Per contra, Id. Departmental Representative submitted that assessee was unable to show why higher

rate of depreciation was charged on windmills. According to him, lower authorities were justified in restricting the claim of depreciation to 5.28%, while computing the profits for applying Section 115JB of the Act.

**11.** We have considered the rival contentions and perused the orders of the authorities below. Section 205 of the Companies Act, 1956 prescribes method of charging depreciation. Relevant extract of the said Section is reproduced hereunder:-

(1), (1A) & (1C)\*\*

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(2) *depreciation shall be provided either--*

- (a) *to the extent specified in section 350 ; or*
- (b) *in respect of each item of depreciable asset, for such an amount as is referred at by dividing ninety-five per cent of the original cost thereof to the company by the specified period in respect of such asset ; or*
- (c) *on any other basis approved by the Central Government which has the effect of writing off by way of depreciation ninety-five per cent. of the original cost to the company of each such depreciable asset on the expiry of the specified period ; or*
- (d) *as regards any other depreciable asset for which no rate of depreciation has been laid down by this Act or any rules made thereunder, on such basis as may be approved by the Central Government by any special order in any particular case :*

*provided that where depreciation is provided for in the manner laid down in clause (b) or clause (c), then, in the event of the depreciable asset being sold, discarded, demolished or destroyed the written down value thereof at the end of the financial year in which the asset is sold, discarded, demolished or destroyed, shall be written off in accordance with the proviso to section 350.*

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- (a) *"specified period" in respect of any depreciable asset shall mean the number of years at the end of which at least ninety-five per cent. of the original cost of that asset to the company will have been provided for by way of depreciation if depreciation were to be calculated in accordance with the provisions of section 350.*

Section 350 of the Companies Act, 1956, referred in clause 2(a) above is reproduced hereunder:-

*350. Ascertainment of depreciation. The amount of depreciation to be deducted in pursuance of clause (k) of sub-section (4) of section 349 shall be the amount of depreciation on assets as shown by the books of the company at the end of the financial year expiring at the commencement of this Act or immediately thereafter and at the end of each subsequent financial year, at the rate specified in Schedule XIV:*

*Provided that if any asset is sold, discarded, demolished or destroyed for any reason before depreciation of such asset has been provided for in full, the excess, if any, of the written-down value of such asset over its sale-proceeds or as the case may be, its scrap value, shall be written off in the financial year in which the asset is sold, discarded, demolished or destroyed".*

A reading of the two sections clearly indicate that assessee can provide depreciation either at the rates

mentioned in Schedule XIV or by following a method specified in clause (b) (c) or (d) of Sub Section (2) of Section 205 of the Companies Act, 1956. Now the claim of the assessee, it seems, is that it had provided higher rate of depreciation on windmills, in accordance with such clause (b) of Subsection(2) to Section 205 of the Companies Act, 1956. For this assessee is relying on notes forming a part of its audited financial statements which is reproduced hereunder:-

*"Depreciation has been provided on the straight-line method as per the rates prescribed in Schedule XIV to the Companies Act, 1956 except in respect of the following categories of assets, in whose case the life of the assets has been assessed as under:*

*Plant & Machinery - Depreciation has been provided based on the expected useful life of the assets of the assets added during the year.*

*Plant & Machinery - Depreciation has been provided for the assets acquired during the earlier years at the rates prescribed in Schedule XIV.*

*The Company has provided depreciation as permitted under Income Tax Act, 1961 on wind mills investments for FY 11-12. Accordingly the current year's depreciation includes Rs. 75,562,500/- charged on such wind mills."*

No doubt, assessee is free to provide depreciation at a rate higher than what is mentioned in Schedule XIV of the Companies Act, 1956. However, in opting for this method assessee has to show that the depreciation is calculated in accordance with clause (b) of Section 205(2) of the Companies Act, 1956. Except for the note mentioned above, nothing was brought on record to show how and on what basis the specified period and the higher rate of depreciation was arrived by the assessee. In such circumstances, lower authorities in our opinion were justified in falling to Schedule XIV of the Companies Act, 1956 and holding that assessee had no reason to provide depreciation at a rate, higher that what was specified in the said Schedule. Coming to the decision of Co-ordinate Bench in the case of *Indowind Energy Ltd*, relied on by the Id. Authorised Representative, it is clearly mentioned at para 14.2 of the said order, that the claim of the concerned assessee was based on realistic facts. Be that as it may, unless an assessee can show that depreciation was provided, by spreading 95% of the original cost, on the specified period, a claim in excess of what is set out in Schedule XIV of the Companies Act, 1956 cannot be allowed. We are therefore of the opinion that lower authorities were justified in recalculating the profit for the purpose of applying Section 115JB of the Act. We do not find any reason to interfere with the orders of the lower authorities. Grounds 5 to 9 of the assessee stand dismissed.

**12.** In the result, the appeal of the assessee stands dismissed.

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